

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of	)	
Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Changes to the Board of Directors of the National Exchange Carrier Associations, Inc.	)	CC Docket No. 97-21
	)	

**ORDER**

**Adopted: March 8, 2005**

**Released: March 9, 2005**

By the Chief, Wireline Competition Bureau:

**I. INTRODUCTION**

1. In this Order, we deny the Petition for Stay Pending Action on Application for Review of Qwest Communications International Inc. (Petition).<sup>1</sup> Qwest seeks a stay of the Wireline Competition Bureau's December 9, 2004 order modifying the deadline for receipt of amended annual Telecommunications Reporting Worksheets (Form 499-A).<sup>2</sup> The *Form 499-A Order* modified the Form 499-A Instructions by instituting a 12-month deadline for a filer to revise its Form 499-A if that revision would decrease regulatory fees or contributions to universal service, interstate Telecommunications Relay Service, number administration, or local number portability.<sup>3</sup> For the reasons discussed below, we conclude that Qwest has not met the legal standards for a stay.

<sup>1</sup> Petition of Qwest Communications International Inc. for Stay Pending Action on Application for Review, CC Docket Nos. 96-45, 98-171, 97-21 (filed Jan. 10, 2005).

<sup>2</sup> *Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review–Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Changes to the Board of Directors of the National Exchange Carrier Associations, Inc.*, CC Docket Nos. 96-45, 98-171, 97-21, Order, DA 04-3669 (rel. Dec. 9, 2004) (*Form 499-A Order*).

<sup>3</sup> *Form 499-A Order* at para. 1. Form 499-A collects information that is used to assess regulatory fees and contributions to federal universal service, interstate Telecommunications Relay Service, the administration of the North American Numbering Plan, and shared costs of local number portability. See 47 C.F.R. §§ 64.604(c)(5)(iii)(B), 52.17(b), 52.32(b).

## II. BACKGROUND

2. Contributors to universal service, interstate Telecommunications Relay Service, number administration, or local number portability must file a Form 499-A on April 1 of each year, reporting their annual revenues from the previous year.<sup>4</sup> Previously, if a contributor discovered an error after filing its Form 499-A, the contributor had to submit a revised Form 499-A by December 1 of the same filing year.<sup>5</sup> A carrier could only file a revised Form 499-A after the nine-month deadline if it could show good cause, demonstrated by an explanation of the cause for the change and complete documentation showing how the revised figures derive from corporate financial records.<sup>6</sup>

3. The *Form 499-A Order* modified the deadline for filing revisions to Form 499-A, allowing 12 months for revisions that result in reduced contributions.<sup>7</sup> The changes were also reflected in the Form 499-A Instructions.<sup>8</sup> The modifications to the Form 499-A deadline became effective January 10, 2005.<sup>9</sup> On the same day, Qwest filed with the Commission an application for review accompanied by a petition to stay.<sup>10</sup> In its Petition, Qwest argues that the Commission has the authority to stay the order under its traditional four-prong test because, Qwest alleges, the order was in violation of Administrative Procedure Act (APA) procedures, no other party will be harmed by the issuance of a stay, there is a strong public interest in the Commission protecting its notice and comment process, and Qwest might be adversely affected by the deadline modification in the future.<sup>11</sup> Qwest makes a separate argument that the Commission has the authority to stay the *Form 499-A Order* so the Commission can review the deadline modification to insure that it has adopted the rule with proper notice and comment, consistent with the public interest.<sup>12</sup>

## III. DISCUSSION

4. In order for the Commission to stay the effect of the *Form 499-A Order*, Qwest must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.<sup>13</sup> If the last three factors strongly favor the party requesting the stay, the

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<sup>4</sup> See 2004 Form 499-A Telecommunications Reporting Worksheet, OMB 3060-0855, at 1 (March 2004)(Form 499-A).

<sup>5</sup> See 2004 Form 499-A Telecommunications Reporting Worksheet, Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms, OMB 3060-0855, at 11 (April 2004)(Form 499-A Instructions).

<sup>6</sup> See Form 499-A Instructions at 11.

<sup>7</sup> *Form 499-A Order* at para. 10.

<sup>8</sup> *Id.*

<sup>9</sup> See 69 Fed. Reg. 71,812 (Dec. 10, 2005).

<sup>10</sup> Petition; Application for Review of Qwest Communications International Inc., CC Docket Nos. 96-45, 98-171, 97-21 (filed Jan. 10, 2005) (Application for Review).

<sup>11</sup> Petition at 3-5.

<sup>12</sup> Petition at 2-3.

<sup>13</sup> *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*Virginia Petroleum*); see also *Telephone Number Portability*; *United States Telecom Association and CenturyTel of Colorado, Inc. Joint Petition for Stay Pending Judicial Review*, Order, 18 FCC Rcd 24664, 24665, para. 4 (2003); *Time Warner Cable v. RCN Telecom Services of New York, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 5025, 5026, para. 2 (2000); *Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998, Personal Communications Services C Block Election Date*, Order, 13 FCC Rcd. 11880, 11881, para. 4 (1998).

Commission may grant the stay if a petitioner makes a substantial case on the merits, rather than demonstrating likely success.<sup>14</sup> We find that Qwest has not satisfied these criteria for the reasons set forth below.

5. First, Qwest has failed to demonstrate that it would suffer irreparable harm absent the issuance of a stay. In order to demonstrate irreparable harm, the harm must be certain and immediate.<sup>15</sup> As it acknowledges in its Petition, Qwest would only suffer harm if it discovered a reporting error in a Form 499-A outside of the 12-month window established in the new rules.<sup>16</sup> Thus, any harm to Qwest is hypothetical, and in any event would not occur until after the end of this year. Such speculative harm fails to meet the legal standard for irreparable harm.<sup>17</sup> Although Qwest states that it has revised its Form 499-As in the past, it provides no evidence that such revisions occurred 12 months after its initial filing, nor does it provide evidence that is likely to be affected by the Form 499-A deadline modification in the future.<sup>18</sup>

6. An evaluation of Qwest's request under the three remaining factors reveals that the balance of the equities clearly weighs against granting a stay. Qwest has not demonstrated that it is likely to prevail on the merits. The Bureau believes that its findings contained in the Form 499-A Order are lawful and in accordance with the APA.<sup>19</sup> The changes to the Form 499-A Instructions are procedural, non-substantive changes to the administrative aspects of the reporting requirements and thus not subject to the notice and comments requirements of the APA.<sup>20</sup> Rules establishing deadlines for applicants to correct errors or defects in their filings are classified as procedural rules and do not require the APA formalities of conducting notice and comment.<sup>21</sup> Our consideration of the final two factors—the impact of the stay on other parties and on the public interest—also weighs against granting the stay. Qwest argues that there is no possibility of harm to any other party as a result of a stay.<sup>22</sup> We disagree. As explained in the *Form 499-A Order*, the firm deadline for filing revisions to Form 499-A helps ensure the stability and sufficiency of the federal universal service for all carriers and consumers.<sup>23</sup> Finally, Qwest asserts that there is a strong public interest in protecting the Commission's notice and comment

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<sup>14</sup> See *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 843-44 (D.C. Cir. 1977). Qwest interprets *Holiday Tours* for the erroneous proposition that meeting *any* three of the four factors will satisfy the four-part test. See Petition at 4. The court in *Holiday Tours* actually determined that a stay may be granted when a movant makes a “substantial case on the merits” and the other three factors, including irreparable harm, strongly favor granting interim relief. *Holiday Tours*, 559 F.2d at 843. As shown *infra*, Qwest clearly falls short of meeting this standard.

<sup>15</sup> See *Michigan Coalition of Radioactive Material Users v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991).

<sup>16</sup> Petition at 5 (stating that “[i]n Qwest’s case the effect [of the *Form 499-A Order*] would not be immediate”).

<sup>17</sup> See *Holiday Tours*, 559 F.2d at 674 (noting that “[b]are allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur”).

<sup>18</sup> See *id.* (“The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.”).

<sup>19</sup> 5 U.S.C. § 553.

<sup>20</sup> *Form 499-A Order* at n.31. See 5 U.S.C. § 553(b)(3)(A) (noting that general notice of rulemaking does not apply to “rules of agency organization, procedure, or practice”).

<sup>21</sup> *JEM Broadcasting Company, Inc. v. Federal Communications Commission*, 22 F.3d 320 (1994) (finding that “a license applicant’s right to a free shot at amending its application is not so significant as to have required the FCC to conduct notice and comment rulemaking”).

<sup>22</sup> Petition at 4.

<sup>23</sup> See *Form 499-A Order* at paras. 2, 10.

processes.<sup>24</sup> Thus, Qwest essentially reasserts its claim that it expects to prevail on the merits. The Bureau believes that the APA rules concerning notice and comment were not implicated in the *Form 499-A Order* because the changes were merely procedural.<sup>25</sup>

7. As mentioned above, Qwest argues that in lieu of applying the standard set forth in *Virginia Petroleum*, the Commission can grant the Petition for Stay by finding that delaying implementation of the deadline modification serves the public interest.<sup>26</sup> Qwest contends that giving the Commission an opportunity to review the rule alterations for lawfulness and consistency serves the public interest because the modifications were made without proper notice and comment.<sup>27</sup> We decline to depart from the Commission's well-settled practice of applying the four factors set forth in *Virginia Petroleum* to determine whether a stay is warranted.<sup>28</sup> Qwest cites two Commission orders in support of its request that the Commission instead apply a public interest analysis. We note that in the first, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Non-Initialized Phones* order, the Wireless Telecommunications Bureau did, in fact, apply the *Virginia Petroleum* test in granting a stay.<sup>29</sup> In the second, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* order, the Commission extended the effective date of certain of the Commission's rules after parties indicated that additional time was necessary to implement those requirements.<sup>30</sup> In addition, the Commission noted that there was congressional action on the same subject as the relevant rules.<sup>31</sup> Neither situation is applicable to the *Form 499-A Order*. Therefore, we decline to apply a standard of review other than that established by *Virginia Petroleum*.

#### IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to authority delegated by sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the Stay Pending Action on Application for Review of Qwest Communications International Inc. is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jeffrey J. Carlisle  
Chief, Wireline Competition Bureau

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<sup>24</sup> Petition at 4.

<sup>25</sup> *Form 499-A Order* at n.31.

<sup>26</sup> Petition at 2-3.

<sup>27</sup> Qwest Petition at 2-3.

<sup>28</sup> 259 F.2d at 925.

<sup>29</sup> *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Non-Initialized Phones*, Order, 17 FCC Rcd 19012, 19014-15, para. 9 (2002).

<sup>30</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 20125, 20126, para. 3 (2004).

<sup>31</sup> *Id.* 19 FCC Rcd at 20127, para. 7